UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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THOMAS J. SPARGO, JANE McNALLY, and PETER KERMANI,

Plaintiffs,

-v- 1:02-CV-1320

NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, GERALD STERN, individually and as Administrator of the State Commission on Judicial Conduct, and HENRY T. BERGER, individually and as Chairperson of the New York State Commission on Judicial Conduct,

Defendants.

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DAVID N. HURD
United States District Judge

## DECISION and ORDER

## I. INTRODUCTION

On March 7, 2003, defendants filed a Notice of Appeal regarding the Memorandum-Decision and Order filed on February 20, 2003, permanently enjoining defendants from enforcing certain sections of the New York State Code of Judicial Conduct ("Code"). Defendants now move for a stay of that permanent injunction pending a resolution of the appeal. Plaintiffs oppose. The motion was taken on submission of the papers without oral argument. Familiarity with the February 20, 2003, Memorandum-Decision and Order is assumed. See Spargo v. New York State Comm'n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003).

## II. DISCUSSION

### A. Standard

Four factors must be considered in determining whether to issue a stay pending appeal. Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002). The factors are "the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest." Id. (citing Hilton v. Braunskill, 481 U.S. 770, 776, 107 S. Ct. 2113 (1987)). The required degree of likelihood of success on the merits varies according to the assessment of the other three factors. Id. at 101. In other words, where there is lower quantum of irreparable injury to the movant if a stay is denied, then a higher showing of likelihood on the merits is required. See id. The inverse is also true. See id. Additionally, "mere repetition of arguments previously considered and rejected cannot be characterized as a 'strong showing'" of success on the merits. Schwartz v. Dolan, 159 F.R.D. 380, 383 (N.D.N.Y. 1995), vacated in part, 86 F.3d

315, 318 (2d Cir. 1996) (noting that it also denied a stay pending appeal). Because the degree of the likelihood of success on the merits varies depending upon the other factors, it will be considered last.

**B. Analysis**

**1. Irreparable Injury to Defendants**

Defendants argue that absent a stay pending appeal, the Commission is impeded from carrying out its mandate under the New York Constitution, and there is confusion and delay in its proceedings. However, as was previously made clear, the Commission is free to pursue misconduct proceedings pursuant to any Code provisions that were not challenged. See 244 F. Supp. 2d at 92. Further, should the decision be reversed on appeal, the Commission could then proceed with any charges. The only possible injury is delay in Commission proceedings. Any delay would not constitute irreparable injury, because proceedings would recommence upon resolution of the appeal. Concern regarding delay pending appeal would better be resolved by requesting an expedited appeal rather than a stay. In sum, a delay in pursuing charges based upon the provisions found to be unconstitutional will result in no irreparable injury to defendants.

Defendants further contend that irreparable injury results because no other Code provisions prohibit unlawful conduct. Again, the only harm from not proceeding with misconduct charges based upon unlawful activity would be delay, lasting only as long as the appeal is pending. In addition, as defendants point out, misconduct based upon unlawful conduct could be pursued while the appeal is pending based upon the state constitutional provision permitting removal of judges "for cause." Further, unlawful conduct should be addressed by a criminal prosecution.

There is no irreparable injury to defendants if the stay is denied.

**2. Substantial Injury to Plaintiffs**

Permitting the Commission to proceed with misconduct charges based upon unconstitutional provisions of the Code would result in substantial injury to plaintiff Spargo. Defendants assert that any such harm can be avoided by continuing the injunction solely as to Spargo. Then the Commission could proceed with misconduct charges against other judges based upon the unconstitutional provisions of the Code. In effect, defendants argument is that harm to Spargo could be prevented, while permitting substantial injury to all those judges against whom charges are brought based upon unconstitutional Code provisions. In other words, remove the risk of harm as to Spargo--at the same time subjecting countless others to the same harm. This argument is rejected out of hand.

**3. The Public Interest**

Defendants argue that the public interest weighs in favor of granting the stay. They argue that delays will occur absent a stay, and that lengthy delays would create havoc in the Commission's carrying out of its (state) constitutional mandate.

Defendants first assert that the significance of the public interest is demonstrated by the derivation of the Code from the American Bar Association provisions and the similarity to the code of conduct applicable to federal judges.[1] That similar provisions may apply to judges outside of the New York State judiciary does demonstrate that there is a significant public interest at stake. However, the public interest will not be served by permitting pursuit of misconduct charges, in New York, based upon unconstitutional Code provisions. Rather,

[1] Defendants' concern is that other jurisdictions may follow the finding that similarly worded provisions are unconstitutional, thus impacting similar judicial conduct commissions beyond New York.

the public interest of New Yorkers will be served by prohibiting the Commission from bringing misconduct proceedings that impinge upon constitutional rights, demonstrating that constitutional rights are of the highest import in New York. Similarly, the public interest of other jurisdictions would not be served by permitting constitutional violations but would be served by preventing such violations. Thus, defendants' argument about the significance of the public interest is not helpful to their contention that it is in the public interest to grant a stay.

Defendants also argue that absent a stay, political parties might pressure judges to become involved in partisan political activity. The argument goes that if judges succumb to this pressure, then the dignity appropriate to judicial office will be denigrated. This argument, if valid, might help demonstrate that maintaining the dignity of the judicial office outweighs the constitutional rights of some of its citizens (judges and judicial candidates), but not that permitting the continuing impingement of constitutional rights is in the public interest. Moreover, the appropriate solution would be rules that are narrowly tailored to serve the interest in maintaining the integrity of the judiciary (in other words, rules that do not unduly impinge upon First Amendment rights).

While confusion and delay in misconduct proceedings may be a temporary result of the injunction, it cannot be said that it is in the public interest to allow the Commission to violate judges' constitutional rights, including core First Amendment rights. Rather, the public interest lies in denying the stay, thereby preventing continued constitutional violations.

**4. Likelihood of Success on the Merits**

Given the lack of irreparable injury to defendant if the stay is denied, the substantial harm to plaintiffs if the stay is granted, and the public interest in denying the stay, there must

be an extremely high likelihood of success on the merits to justify granting the stay. See Mohammed, 309 F.3d at 101. Defendants' arguments regarding success on the merits are simply attempts to re-argue issues previously decided--with the introduction of contentions not previously made or made but not adequately supported. Such reargument cannot support a finding of a strong likelihood of success on the merits. See Schwartz, 159 F.R.D. at 383. However, a few matters merit mention.

On the abstention issue, defendants argue that Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597 (1980) (per curiam) illustrates that a request for review is not the only way to assert constitutional challenges; Article 78 is available.[2] The defendants never argued that Article 78 was a viable avenue for constitutional challenges to Code provisions. Therefore, the availability of Article 78 cannot now be sustained as a basis for finding that a state forum was available, making abstention appropriate. Further, it is again noted that Nicholson is inapposite because the Article 78 proceeding was not in the context of a misconduct proceeding against the plaintiff.

In additional support for their argument that there is a likelihood of success on the abstention issue, defendants cite In re Sims, 61 N.Y.2d 349 (N.Y. Ct. App. 1984). This case was not previously cited, despite a direct request by the Court for case law in which the Court of Appeals reached a constitutional question on a review of a Commission determination.

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[2] First, it is not at all clear that Article 78 is available to Spargo, as administrative proceedings are ongoing. See N.Y. C.P.L.R. § 7801 (McKinney 1994). It is even more unclear how this provision would be available to McNally and Kermani, as defendants have merely stated Article 78's availability to them, without giving any clue as to how such an action would be framed or citing any analogous cases from which a clue could be derived. See id. § 7801 & Practice Commentaries (explaining the situations in which Article 78 actions may be brought).

Moreover, defendants mischaracterize the decision. Defendants state that the Court of Appeals "discussed the [constitutional] issues and referred to both statutory law and prior decisions . . . [then] specifically rejected Judge Sims [sic] contention that the phrase 'appearance of impropriety' was unconstitutionally vague." (Defs.' Mem. at 7.) To the contrary, the court did not discuss the constitutional issues, and the statutory and case law referenced did not even mention the constitutionality of Code provisions. In answer to Sims' contention that her due process rights were violated, the court merely found that "the investigation was thus based on adequate factual and legal requirements as required by the Judiciary Law and the commission's rules." In re Sims, 61 N.Y.2d at 358 (internal citations omitted). The court went on to state Sims' contention that the phrase "appearance of impropriety" was unconstitutionally vague, and noted that the appearance of impropriety rules "have [been] repeatedly upheld." Id.

> The complete analysis of the vagueness question was as follows:
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> > Finally, petitioner contends that the ethical mandate that Judges avoid even an appearance of impropriety is unconstitutionally vague and will result in her punishment for acts which she could not know were proscribed. We have repeatedly upheld the appearance of impropriety rules and stated that Judges may be held to this admittedly high standard of conduct in performing their duties or even when performing nonjudicial duties (see Matter of Aldrich v. State Comm. on Judicial Conduct, 58 NY2d 279, 283; Matter of Cunningham, 57 NY2d 270, 274-275, supra.; see, also, Matter of Shilling, 51 NY2d 397, supra.; Matter of Lonschein, 50 NY2d 569, 572; Matter of Spector v. State Comm. on Judicial Conduct, 47 NY2d 462, 469, supra).

Id. Clearly this is not a specific rejection of Sims' contention that the phrase is unconstitutionally vague--it is not a constitutional analysis at all. This is particularly evident upon perusal of the case law cited as authority that the appearance of impropriety rules had been repeatedly upheld. No constitutional question is raised in any of the cases cited. See

Aldrich v. State Comm'n on Judicial Conduct, 58 N.Y.2d 279, 280-286 (N.Y. Ct. App. 1983); In re Cunningham, 57 N.Y.2d 270, 272-278 (N.Y. Ct. App. 1982); In re Shilling, 51 N.Y.2d 397, 399-411 (N.Y. Ct. App. 1980); In re Lonschein, 50 N.Y.2d 569, 571-575 (N.Y. Ct. App. 1980); Spector v. State Comm'n on Judicial Conduct, 47 N.Y.2d 462, 464-70 (N.Y. Ct. App. 1979). These were merely cases on review of misconduct determinations grounded in the appearance of impropriety provision. See Aldrich, 58 N.Y.2d at 282; In re Cunningham, 57 N.Y.2d at 274-75; In re Shilling, 51 N.Y.2d at 401-02; In re Lonschein, 50 N.Y.2d at 572; Spector, 47 N.Y.2d at 468-69. Thus, the inference--that this provision had repeatedly passed constitutional muster--drawn from the iteration of Sims' constitutional challenge followed by the "repeatedly upheld" language is invalid. What was actually "repeatedly upheld" were misconduct charges brought for violations of this provision. Therefore, the defendants have again failed to provide a single case in which the Court of Appeals accepted and analyzed constitutional claims such as those raised by the plaintiffs.

Some particularly apt comments were made in dissent in Spector. The dissenter noted concern "with what can be a very subjective and often faulty public perception," stating "The 'appearance of impropriety' concept is beset by legal and moral complexity." 47 N.Y.2d at 472 (Fuchsberg, J., dissenting). It was further noted that the "lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications." Id. at 473. (This is the only hint of a constitutional concern in all of the authority cited by the Sims Court for the proposition that the provision had been repeatedly upheld.) United States Supreme Court Justice Arthur Goldberg was quoted characterizing the appearance of impropriety standard as "unbelievably ambiguous." Id.

Defendants raise a new argument in support of their contention, previously made, that Court of Appeals review of misconduct determinations is mandatory.[3] They argue that the Court of Appeals rules, as well as the jurisdictional statement in cited case law, imply that a request initiates the review, rather than requiring a grant or denial of the review. First, a statement such as "[s]he initiated this proceeding to review a determination . . ." cannot be taken as a determination that review is mandatory. See In re Sims, 61 N.Y.2d at 351. Rather, the wording indicates that it is merely a statement of background, introducing the case. See id.; In re Greenfeld, 71 N.Y.2d 389, 390 (N.Y. Ct. App. 1988) (stating that "Petitioner instituted this proceeding to review . . . "). Further, language in some cases could be read the opposite; that is, that the request must be resolved initially. See In re Greenfield, 70 N.Y.2d 778, 778 (N.Y. Ct. App. 1987) (suspending petitioner "pending disposition of his request . . . "). Finally, even if review were mandatory, a constitutional question would still not be before the Court of Appeals for review, when it has been ignored by the Commission as beyond its authority. See In re Shaw, 96 N.Y.2d 7, 12 (N.Y. Ct. App. 2001) (per curiam) (noting that review is limited to the record at the time of the Commission's determination). Apparently, all previous constitutional challenges have been ignored by the Commission.

Defendants argue that no distinction was made between the investigation and the hearing to support the contention that a full record would be before the Court of Appeals on review, rather than a "scant" record. As previously noted, see Spargo, 244 F. Supp. 2d at 84, the support for that conclusion was that during the course of the investigation of Spargo,

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[3] They also cite the Court of Appeals' acceptance of more than 79 requests for review, and no denials of requests, in the last 24 years as indicative of the mandatory nature of review. Again, this is new information not previously provided. Moreover, even if all requests for review have been granted to date, that does not mean that review is mandatory.

his challenge to the constitutionality of the Code provisions at issue was completely ignored by the Commission. When the Commission ignores such a challenge, the record would necessarily be devoid of a constitutional analysis. Again, the defendants have failed to cite

even one case where the Commission has analyzed and addressed a constitutional challenge to specific provisions of the Code. [4]

Defendants raise the new argument that it is proper for the Court of Appeals to decide a case before it on other grounds even when a constitutional challenge is raised. While this may be true, defendants have not cited a single case in which the Court of Appeals declined to decide a constitutional issue because of a determination on other grounds. Thus, this argument is not helpful in establishing a likelihood of success on the merits regarding the abstention issue.

Regarding the merits of the First Amendment issue, defendants attempt, for the first time, to distinguish the speech at issue in Republican Party of Minnesota v. White, 536 U.S. 765, 122 S. Ct. 2528 (2002) from the speech at issue here. In White, the speech at issue was judicial candidates announcing views on issues. See id. at 770, 122 S. Ct. at 2532. Here, the political conduct during a campaign is at issue. There simply is no real difference between the two--in both cases political speech was at issue.

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[4] Defendants set forth new information, not previously provided, calling into question the assertions in the Pisani affidavit regarding the Commission investigation of Elizabeth Shanley. Pisani asserted that Shanley raised a constitutional challenge early in the investigation, while defendants contend that Shanley failed to raise such a challenge before the Commission or in her main brief before the Court of Appeals, thus leaving the issue unpreserved for appeal. The circumstances still illustrate how a constitutional challenge at an early stage in misconduct proceedings can easily be outside the authority of the Commission and the scope of review by the Court of Appeals.

For example, a judge may raise a free speech constitutional challenge before the referee. When the referee recommends no sanction, the judge has no incentive to raise the challenge before the Commission. Even if the referee does recommend a sanction, a constitutional challenge would not be raised before the Commission, for history tells judges that to pursue such a challenge is fruitless because it will not even be considered, let alone addressed, by the Commission. The Commission has always limited itself to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of [state court judges]," N.Y. Const. art. 6 § 22(a) (McKinney Supp. 2003), and not to render constitutional opinions.

Defendants also again advance the argument that in New York State The Canons of Judicial Ethics have a long-standing tradition of guiding judicial conduct. This is merely a reiteration of the arguments made previously, and does nothing to support a finding of a strong likelihood of success on the merits. See Schwartz, 159 F.R.D. at 383.

Finally, defendants argue for the first time that the applicable provisions are not vague because the Chief Administrator established a panel to issue Advisory Opinions that set forth specific factual guides which create a presumption of proper conduct if followed. This argument presupposes that every possible factual scenario is covered by the Advisory Opinions. Notably, defendants do not cite to any Advisory Opinion similar to the fact patterns of the charges against Spargo. Moreover, even if the supposition were accurate, it does not alter the fact that the actual provisions of the Code in question are insufficiently specific to put judges and judicial candidates on notice as to what conduct is prohibited, and defendants cite no authority to support use of such extraneous materials in finding vague provisions constitutional. In fact, requiring judicial candidates and duly elected or appointed judges to seek an advisory opinion from a panel before speaking or acting--for fear of disciplinary action and sanctions--appears to be the ultimate in prior restraint. It clearly places further limitations upon their conduct and First Amendment rights.

**III. CONCLUSION**

No irreparable injury will inure to defendants if a stay is denied. Substantial harm to the plaintiffs will result from granting a stay. The public interest lies with denying a stay, preventing constitutional violations. Defendants have not established an extremely high likelihood of success on the merits. Therefore, consideration of the four required factors leads to the conclusion that the stay must be denied.

Accordingly, it is

ORDERED the defendants' motion for a stay pending appeal is DENIED.

IT IS SO ORDERED.

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United States District Judge

Dated: April 29, 2003
Utica, New York.